BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALICIA K. WILSON	)	
Claimant	)	
	)	
V.	)	
	)	
STAFFPOINT, LLC	)	
Respondent	)	Docket No. 1,059,043
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 12, 2014, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on April 14, 2015. Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Eric T. Lanham of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant's November 23, 2011, injury arose out of and in the course of her employment with respondent. The ALJ awarded claimant permanent total disability and future medical treatment. The ALJ found an overpayment of temporary total disability benefits in the amount of $1,506.94 and applied a credit to claimant's permanent total disability benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant's injury did not arise out of and in the course of her employment and was not the prevailing factor causing her medical condition, need for treatment, and resulting disability or impairment. Should claimant's injury be found compensable, respondent argues the ALJ erred in finding claimant permanently totally disabled as a result of her work accident. Respondent also argues the ALJ exceeded his authority and/or jurisdiction in granting benefits to claimant.

Claimant contends the evidence proves her injury is compensable and that she is realistically unable to work. Claimant argues she is entitled to future medical care and permanent total disability benefits pursuant to K.S.A. 2011 Supp. 44-510c.

The issues for the Board's review are:

1. Did claimant's injury arise out of and in the course of her employment with respondent?

2. What is the nature and extent of claimant's disability?

3. Did the ALJ exceed his authority and/or jurisdiction in granting benefits to claimant?

FINDINGS OF FACT

Claimant began working at the telecommunication center for Centrinex at the direction of respondent, a temporary employment placement agency, in October 2011. In this position, claimant approved loans and received and placed calls. Claimant stated she was required to sit at a workstation during her shift and could not stand. Claimant was employed full-time, earning an average weekly wage of $312.64.

On November 23, 2011, claimant took her morning break in a parking lot on Centrinex' premises. While she was leaning against a vehicle in the parking lot, another car turned into the adjacent space and struck claimant. Claimant stated the car ran over both of her feet, and when the driver attempted to back out of the space, claimant was again struck by the car. Claimant testified her left leg became pinned between the two vehicles, and she experienced pain in her low back, left leg and both feet following the incident. Claimant stated she immediately informed her supervisor of the accident but was told if she left, she risked termination. Claimant completed her work day and continued to work her full shift before she was terminated for unknown reasons on November 30, 2011.

Claimant initially sought medical treatment at Truman Medical Center. She was eventually referred to Dr. Terrence Pratt, a physician authorized by the court for treatment. Dr. Pratt diagnosed low back pain with radicular symptoms and provided physical therapy and medication. When conservative treatment failed to alleviate claimant's symptoms, Dr. Pratt ordered an MRI of the lumbar spine, which was conducted on July 11, 2012. The MRI was read to reveal multilevel degenerative disc disease with a protrusion at L4-5 with moderate central canal stenosis and mild disc bulging at L5-S1. Dr. Pratt determined claimant sustained a herniated disk at L4-5 and recommended epidural steroid injections. Claimant underwent injections. After the second injection, claimant stated she developed increased back pain and urinary incontinence. Dr. Pratt referred claimant to Dr. Mauricio Valdes, an orthopedic surgeon in his group.

Dr. Valdes first saw claimant on November 15, 2012. Dr. Valdes reviewed Dr. Pratt's treatment records and the July 2012 MRI. Dr. Valdes testified the MRI showed a significant disc protrusion at L4-5, causing severe stenosis at this level with significant narrowing of the space. Dr. Valdes noted the report indicated the stenosis was moderate, though he felt it was "actually pretty severe."[1] He further noted claimant had degenerative changes in the lumbar spine which were normal for her age and were not caused by the work accident of November 23, 2011.

Claimant complained to Dr. Valdes of increased pain and numbness in her lower extremities, especially on the right, and increased pain in her back. She continued to complain of urinary incontinence. After performing a physical examination, where claimant "showed significant weakness of the lower extremities on neurologic exam and signs and symptoms of incontinence, including lack of rectal tone,"[2] Dr. Valdes determined claimant had findings compatible with cauda equina syndrome and recommended immediate surgery.

Prior to the surgery, an MRI was taken of claimant's lumbar spine, thoracic spine, and cervical spine. Claimant's thoracic spine MRI was negative. The cervical spine MRI revealed degenerative changes, mild central spinal canal stenosis at C5-6 and multilevel neural foraminal stenosis of varying severity. The lumbar spine MRI revealed degenerative disc disease in the mid and low lumbar spine, mild central spinal canal stenosis at L3-4 and L5-S1, moderate to severe left greater than right spinal canal stenosis at L4-5, and mild to moderate left greater than right neuroforaminal stenosis at L4-5.[3]

On November 20, 2012, Dr. Valdes performed a lumbar decompression from L4 to S1, posterior decompression with discectomies, fusion and instrumentation. Dr. Valdes testified claimant improved following surgery; her urinary incontinence was cured, but claimant continued having back pain and antalgic gait. Dr. Valdes recommended claimant receive an outside bone stimulator, but due to claimant's continued cigarette smoking, it was never authorized. Claimant continued to follow up with Dr. Valdes until her release on February 12, 2014. Dr. Valdes testified he released claimant with no restrictions because her therapist believed claimant's functional capacity test results were invalid.

Dr. Valdes testified he assumed claimant would perform sedentary work upon her release, and he would not recommend she perform any heavy lifting, excessive bending or prolonged captive positioning. In a letter dated March 27, 2013, Dr. Valdes wrote, "In my opinion, [claimant's] November 23, 2011, accident was the prevailing factor in causing

---

[1] Valdes Depo. at 9.

[2] *Id.*, Ex. B at 1.

[3] See Valdes Depo., Ex. F at 13-17.

her low back pain and neurologic findings . . . ."[4] Dr. Valdes testified he felt the mechanism of claimant's injury caused the herniated disc at L4-5 leading to severe narrowing of the nerve space. Dr. Valdes opined claimant would benefit from consultation with a pain psychologist.

Dr. David Ebelke, a spine surgeon, examined claimant at respondent's request on March 4, 2013. Claimant complained of pain in the low back, buttocks, and lateral thighs. Dr. Ebelke noted claimant informed him the surgery helped, but she continued limping and used a cane at the time of her visit. After reviewing claimant's history, medical records (which Dr. Ebelke noted to be incomplete), and performing a physical examination, Dr. Ebelke determined claimant's mechanism of injury did not sound capable of having caused or contributed to the findings on the November 2012 lumbar MRI. Dr. Ebelke testified he believed claimant had a protrusion at L4-5 and not a true herniation. He opined claimant did not have true cauda equina syndrome and did not require immediate surgery. Dr. Ebelke clarified claimant may have needed surgery, but it was not on an urgent basis and she did not require the type of operation she received. Dr. Ebelke wrote:

> In my opinion [claimant] didn't need fusion of either level as a result of the work incident, and didn't need the thoracic MRI.
>
> . . .
>
> I can't state that the work incident was the prevailing factor [of] her medical conditions, within a reasonable degree of medical certainty. It's possible it was somehow partly related, if it caused or contributed to the left L4-5 disc bulge/protrusion, but again I can't state that within reasonable medical certainty.
>
> . . .
>
> It's possible the work incident triggered or precipitated the onset of symptoms from pre-existing conditions that she wasn't aware of, without causing an anatomical change in those conditions.[5]

Dr. Zhengyu Hu, a pain management physician, examined claimant at respondent's request on May 5, 2014. Claimant complained of severe pain in both sides of her low back, the left worse than the right, with the pain extending into her lower extremities with numbness/tingling and mild weakness. After reviewing claimant's history, available medical records and performing a physical examination, Dr. Hu determined claimant has chronic low back pain with lower extremity radicular symptoms on both sides, bilateral SI joint dysfunction, and neck pain. Dr. Hu recommended claimant undergo steroid injections

---

[4] Valdes Depo., Ex. B at 1.

[5] Ebelke Depo., Ex. 2 at 4.

in the lumbar spine, which he provided on May 22, 2014, and June 2, 2014. Dr. Hu also provided claimant with medication. Dr. Hu did not see claimant after June 2, 2014, though he had at that time recommended an additional injection. Dr. Hu testified claimant still needed the SI joint injection, and if claimant should continue to have right lower extremity pain, then she would need to have an injection for that as well.

On May 27, 2014, orthopedic surgeon Dr. Edward Prostic examined claimant at claimant's counsel's request. Claimant complained of constant pain in the low back and into both thighs, worsening with almost all activities. Dr. Prostic reviewed claimant's history, which included psychological treatment for post-traumatic stress disorder, major depressive disorder, alcohol dependence, cocaine abuse, cannabis abuse, and nicotine dependence. Dr. Prostic also reviewed claimant's available medical records and performed a physical examination. He noted claimant continued with intractable symptoms following surgery, and indicated claimant's condition was complicated by psychological barriers to improvement. Dr. Prostic opined additional treatment is unlikely to be beneficial, and she is at maximum medical improvement orthopedically. Dr. Prostic restricted claimant to light-duty employment.

Using the AMA *Guides*,[6] Dr. Prostic opined claimant sustained a 25 percent orthopedic impairment to the body as a whole on a functional basis. Dr. Prostic wrote:

> When [claimant's impairment is] added to emotional features and her education and training, [claimant] is very likely permanently and totally disabled from gainful employment. The injury sustained while employed by [respondent], November 23, 2011 is the prevailing factor in the injury, the medical condition, the need for medical treatment, and the resulting disability or impairment.[7]

Michael Dreiling, a certified vocational consultant, interviewed claimant on June 3, 2014, at her counsel's request. Mr. Dreiling obtained a history from claimant. He testified:

> [Claimant] did not finish high school. High school was difficult. She indicated making below-average grades. Apparently attempted to get her GED, was not successful. Has no typing abilities. Limited abilities with a personal computer. Apparently some type of on-the-job training when she did work as a nurse aide. There's no further academic or vocational training, so basically we've got someone who's not a high school graduate, no further training.[8]

---

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Prostic Depo., Ex. 2 at 3.

[8] Dreiling Depo. at 5-6.

Mr. Dreiling indicated claimant's lack of a high school education would significantly erode her ability to pursue even entry-level, unskilled work. This, combined with claimant's lack of typing/computer skills and medical restrictions, limits claimant's ability to find work in the open labor market. Mr. Dreiling opined claimant was essentially and realistically unemployable in the open labor market due to her vocational factors.

Mr. Dreiling generated a report on June 4, 2014, where he identified 11 unduplicated work tasks claimant performed in the 5 years prior to the 2011 accident. Dr. Prostic reviewed the task list produced by Mr. Dreiling. Of the 11 unduplicated tasks on the list, Dr. Prostic opined claimant was unable to perform 7, for a 63.6 percent task loss.

Claimant testified she had no problems in her back or legs prior to November 23, 2011. She stated she has constant low and mid back pain with pain in her legs, and she is unable to bend or lift. Claimant has not worked since November 30, 2011.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> . . .
>
> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or

> precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> > (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> >
> > (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> > (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> >
> > (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> >
> > (iii) accident or injury which arose out of a risk personal to the worker; or
> >
> > (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-510c(a)(2) provides:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

A person is permanently and totally disabled when he or she is "essentially and realistically unemployable.[9]

[9] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

ANALYSIS

1. Did claimant's injury arise out of and in the course of her employment with respondent?

Respondent's primary argument is that claimant's injury was not the prevailing factor causing her medical condition, need for treatment, and resulting impairment and disability. Respondent argues, inter alia, claimant's low back condition is the result of the natural aging process. The testimony and records of Dr. Valdes support a finding claimant suffered an injury beyond simply the natural aging process. Dr. Valdes' testimony and records indicate claimant did not solely suffer an aggravation of a preexisting condition. The testimony of Dr. Valdes supports new physical findings resulting from the November 23, 2011, accident.

The Board has found work-related injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. The following decisions support compensability where there is a demonstrated physical injury or change in physical structure beyond a simple aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.[10]

- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.[11]

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.[12]

- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor

---

[10] *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

[11] *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

[12] *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

opined the accident caused a new tear in claimant's medial meniscus.[13]

- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.[14]

- A motor vehicle accident did not solely aggravate, accelerate or exacerbate a claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.[15]

The ALJ wrote, "[T]he court is more persuaded by the testimony of the treating physician, who assessed the disk condition first hand."[16] The Board agrees with the ALJ in respect to giving more weight to the opinions of the treating physician in this instance. Drs. Prostic and Ebelke had only one opportunity to examine the claimant. Dr. Valdes had an opportunity to observe claimant over a period time and view first-hand the extent of claimant's injuries during surgery.

While Dr. Valdes noted claimant had some degenerative changes in the lumbar spine related to the natural aging process, he specifically related claimant's herniated L4-5 to the November 23, 2011, injury.[17] Regarding the bulging L5-S1 disc, Dr. Valdes testified, "More likely than not the stenosis was worsened by the accident."[18] After he was given the opportunity to review medical records related to claimant's August 2012 fall, Dr. Valdes testified:

> Q. So even reviewing these additional medical records, it is still your opinion that the claimant's work-related fall from November of 2012 [*sic*] was the prevailing factor in causing the medical conditions that you provided that surgery for, or does this change that opinion?

---

[13] *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

[14] *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

[15] *Gilpin v. Lanier Trucking Co.,* No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

[16] ALJ Award (Dec. 12, 2014) at 4.

[17] See Valdes Depo. at 12.

[18] *Id.* at 19.

> A. I believe so. Because she had some symptoms reported here, written here, that she had since that accident.[19]

Based upon the evidence presented, the Board finds claimant suffered an injury arising out of her employment with respondent.

2. What is the nature and extent of claimant's disability?

The only evidence of permanent impairment was provided by Dr. Prostic. Dr. Prostic assessed a 25 percent impairment to the body as a whole for claimant's low back condition. As his opinion in this regard is uncontroverted, the Board, as did the ALJ, adopts this assessment of impairment. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[20]

The ALJ found claimant to be permanently and totally disabled. The Board agrees. When Dr. Valdez released claimant he assumed it would be to sedentary work. When Dr. Valdez was asked if he would allow claimant to work in a factory, he replied, "If it involves sitting intermittently, standing, and not involving heavy lifting, that would be reasonable, now that she seems to be fused."[21] When asked if he would recommend lying down a couple of times a day, Dr. Valdes answered, "I will recommend most likely activity with periods of sitting down, maybe activity with periods of sitting down 10-20 minutes per hour."[22]

Dr. Prostic recommended light duty restrictions, including avoidance of frequent bending or twisting at the waist and forceful pushing or pulling, and no more than minimal use of vibrating equipment or captive positioning. Utilizing Dr. Prostic's restrictions, Mr. Dreiling provided the only opinion contained in the record regarding claimant's wage loss and employability. Mr. Dreiling opined, based upon claimant's vocational profile and Dr. Prostic's restrictions, claimant is essentially and realistically unemployable. Mr. Dreiling's vocational opinions are uncontradicted.

Respondent argues Mr. Dreiling's opinion is flawed because he included claimant's preexisting psychiatric condition in his evaluation. In his report, Mr. Dreiling did not specifically list claimant's preexisting psychiatric condition in his conclusions. Even if he had, under *Wardlow*, the determination of permanent total disability rests on a variety of

---

[19] *Id*. at 31.

[20] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

[21] Valdes Depo. at 68-69.

[22] Id. at 68.

elements, including a claimant's limitations of physical activity, age, lack of training, driving and transportation problems, history of physical labor jobs, and other factors.[23] In *Loyd v. ACME Foundry, Inc.*,[24] the Court of Appeals included lack of education and low intelligence as factors to be considered as part of the totality of the circumstances in determining whether a claimant is permanently and totally disabled.

Considering all of the evidence presented, the Board agrees with the ALJ. Claimant is permanently and totally disabled.

3. Did the ALJ exceed his authority and/or jurisdiction in granting benefits to claimant?

Administrative law judges have the authority to award or deny compensation pursuant to K.S.A. 2011 Supp. 44-523(c) and K.S.A. 2011 Supp. 44-551(l)(1). The ALJ did not exceed his authority in granting benefits to claimant.[25]

CONCLUSION

Claimant suffered an injury to her low back arising out of and in the course of her employment with respondent on November 23, 2011. Claimant is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 12, 2014, is affirmed.

IT IS SO ORDERED.

---

[23] *Wardlow, supra,* at 114.

[24] *Loyd v. ACME Foundry, Inc.*, No. 100,695 (Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009).

[25] *Kellogg v. AT&T*, No. 1,055,624, 2014 WL 4976738 (Kan. WCAB Sept. 16, 2014).

Dated this _____ day of June, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
hornerduckers@yahoo.com

Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
elanham@mvplaw.com
mvpkc@mvplaw.com

Kenneth J. Hursh, Administrative Law Judge